91-702



NO. _____

**In the**
**SUPREME COURT OF THE UNITED STATES**
**October Term, 1990**

**In Re**
**UNITED STATES GOVERNMENT EX REL., PAUL HOUCK AND THE LAKEVIEW DAIRY, INC.,**

**Petitioners,**

***versus***

**HON. HARLINGTON WOOD, JR.**
**HON. RICHARD D. CUDAHY,**
**HON. MICHAEL S. KANNE,**
**HON. ANN WILLIAMS**
**All Judges in the Seventh Circuit,**

**Repondents.**

# PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

## PETITION FOR WRIT OF MANDAMUS

---

JOHN D. BRENNAN
Attorney for Petitioners
205 West Randolph, Suite 1310
Chicago, Illinois 60606
(312) 853-3600

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the remainder of the class action fund should be distributed in accordance with the Seventh Circuit opinion known as Folding Carton I (744 F.2d 1252) or in accordance with the Seventh Circuit opinion known as Folding Carton II (881 F.2d 494)?

2. Whether the petitioners have the right to intervene and uphold the opinion in Folding Carton I?

3. Whether the failure to follow the order of Folding Carton I constitutes a violation of the Federal False Claims Act?

## LIST OF PARTIES TO THE PROCEEDINGS

UNITED STATES GOVERNMENT ex rel, PAUL HOUCK, LAKEVIEW DAIRY, INC.,

FOLDING CARTON ADMINISTRATION COMMITTEE; PERRY GOLDBERG; ALTHEIMER & GRAY; ALEXANDER R. DOMANSKIS; ROSS & HARDIES; JAMES B. SLOAN, Esq.; SLOAN ASSOCIATES; THOMAS J. BOODELL, JR.; KECK, MAHIN & CATE, MICHAEL M. MULDER OF THE LAW FIRM OF MEITES & FRACKMAN, AS COUNSEL FOR BEATRICE COMPANIES, INC.; THOMAS P. LUNING, OF THE LAW FIRM OF SCHIFF, HARDIN & WAITE, AS COUNSEL FOR FEDERAL PAPER BOARD COMPANY, INC.; ALAN WISEMAN, OF THE LAW FIRM OF HOWREY & SIMON, AS COUNSEL FOR THE MEAD CORPORATION; LOWELL E. SACHNOFF, OF THE LAW FIRM OF SACHNOFF, WEAVER & RUBENSTEIN, LTD., AS COUNSEL FOR GRIST MILL CO.; DOUGLAS V. RIGLER, OF THE LAW FIRM OF KAPLAN, RUSSIN & VECCI, COUNSEL FOR G. HEILEMANN BREWING CO.; EUGENE M. WAR-

LICH, OF THE LAW FIRM OF DOHERTY, RUMBLE & BUTLER, P.C., AS COUNSEL FOR LAND O'LAKES, INC.; STEVEN LAWSON OF THE LAW FIRM OF JOHNSON & COLMAR, AS COUNSEL FOR AVERY INTERNATIONAL CORP; HANSCHY INDUSTRIES, INC.; JOHN C. GILMOE (as successor in interest to WM. Y. GILMORE & SONS, INC.); ZACHARY CONFECTIONS, INC.; HAROLD E. KOHN, OF THE LAW FIRM OF KOHN, SAVETT, MARION & GRAF, P.C., AS COUNSEL FOR CUMBERLAND FARMS AND PANTRY PRIDE ENTERPRISES; and LOYOLA UNIVERSITY SCHOOL OF LAW,

HON. HARLINGTON WOOD, JR.; HON. RICHARD D. CUDAHY; HON. MICHAEL S. KANNE; and HON. ANN WILLIAMS, All Judges in the Seventh Circuit.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## SUPREME COURT RULES



## STATUTES OF THE UNITED STATES

**In the**
**SUPREME COURT OF THE UNITED STATES**
**October Term, 1990**

**In Re**
**Folding Carton Reserve Fund**
**MDL 250**

# PETITION FOR WRIT OF MANDAMUS AND FOR ORDERS OF GUIDANCE IN THE WINDING UP OF THE FOLDING CARTON RESERVE FUND

The United States Court of Appeals for the Seventh Circuit and the District Court for the Northern District of Illinois Eastern Division have entered administrative orders with regards to a fund created as a settlement of a class action brought to compensate certain individuals and/or entities under Rule 23 of the Federal Rules of Civil Procedure and Multi-district Rules of this Court. These orders include the following findings:

1. The fund was created from a class action brought pursuant to Rule 23 of the Federal Rules of Civil Procedure. The amount of the original settlement fund created was approximately $200,000,000. Approximately $6,000,000 was to be held for one year under the jurisdiction of the Seventh Circuit Court's order and opinion known as Folding Carton I (744 F2d 1252, 7th Cir. decided September 5, 1984) for the purpose of compensating late claimants, and the remaining funds were then to be deposited into the United States Treasury pursuant to 28 USC 2041 and 2042 in order to compensate any other late claimants.

2. The Seventh Circuit Court of Appeals later issued a contradictory order and opinion in the matter of *Paul Houck, on behalf of the United States of America v. Folding*

*Carton Administration Committee, et al* in the opinion known as Folding Carton II (881 F2d 494, argued November 8, 1988, reargued April 12, 1989 and decided August 9, 1989) in allowing more compensation to previously compensated members of the plaintiff's class and applying the doctrine of cy pres rather than depositing the funds in the United States Treasury as the opinion in Folding Carton I had ordered.

3. The Seventh Circuit Court of Appeals has refused to hear the appeals in Mr. Houck's case and have declared that the law of the case with regards to the winding up and distribution of the funds under Rule 23 should now be applying the doctrine of cy pres in order to set up a Skadden-type public interest fellowship program rather than escheat the funds to the United States Treasury as it previously ordered.

4. The District Court and the Seventh Circuit by its opinion in Folding Carton II have wrongfully denied the right of the United States from intervening to protect its interest in the fund as created under Folding Carton I.

5. The District Court and the Seventh Circuit, by its opinion and orders now being decided in Folding Carton II, have wrongfully denied Paul Houck the right to intervene on behalf of specifically named late claimants and the United States in order to uphold the integrity of the order entered in Folding Carton I.

6. The Memorandum opinion and order of Circuit Court Judge Williams dated March 6, 1991 set forth the administration of the fellowship program that Folding Carton II ordered. That opinion was adapted by the Seventh Circuit in its order of May 28, 1991 and September 9, 1991.

7. Mr. Houck filed his Mandamus action with this Court on May 24, 1991 attacking the opinion and order of Judge Williams dated May 6, 1991. It was returned to him on June 10, 1991 in that it was not submitted on the correct paper size. Therefore, this filing should relate back to the filing of May 24, 1991, and is directed at the opinion and

order of Judge Williams which was thereafter adopted by the Seventh Circuit.

WHEREFORE, the petitioner, Paul Houck, on behalf of the United States and late claimants, requests relief as stated herein for Writ of Mandamus, and the equitable relief such as an accounting in that only this court can exercise jurisdiction to determine what the law of the case is with respect to the distribution of the reserve after Judge Will and the defendant administrative committee were ordered by the Seventh Circuit Court of Appeals in Folding Carton I to deposit the balance remaining in the reserve fund on September 5, 1985 into the United States Treasury General Fund for the express purpose of compensating late claimants. The Seventh Circuit Court of Appeals has contradicted its previous mandate with its opinion in Folding Carton II with regards to the administration of the funds remaining after September 5, 1985. Therefore, there is a conflict in the Seventh Circuit with respect to how to wind up and administrate the funds remaining after September 5, 1985. The orders of the Seventh Circuit with respect to winding up the case known as MDL 250 are purely administrative in nature. Because of the conflict between Folding Carton I and II, only this Court can now determine what the law of the case is with respect to how the remaining funds should be distributed pursuant to Rule 23 of the Federal Rules of Civil Procedure. This Court must enter orders of mandamus to the Seventh Circuit and the Northern District of Illinois Eastern Division in order to clear up this conflict and preserve the doctrine of stare decisis and to keep the funds from being distributed in accordance with Judge Williams' opinion and order. Those orders should include an accounting of all funds distributed since September 5, 1985 and whether any such distributions were distributed for the use and benefit of the class members or potential class members whose rights had been proven to have been violated and whether any funds distributed since September 5, 1985 are funds that have been distributed in accordance with Folding Carton I.

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the order of the Seventh Circuit Court of Appeals opinion in Folding Carton I should be upheld as a precedent as the law of the case concerning the proper use of the reserve fund and the proper administrative method of winding up this multi-district class action within the jurisdictional requirements of Rule 23 of the Federal Rules of Civil Procedure, the legislative requirements of the United States taking control of the fund pursuant to 28 USC §2042 and the general jurisdictional limits for winding up this kind of multi-district litigation under the Rules of Procedure of the Judicial Panel on Multi-district Litigation? Specifically, whether the application of the doctrine of cy pres is even an appropriate method of winding up this kind of fund under those rules and the statutory requirements of 28 U.S.C. §2041 and §2042?

2. Whether Paul Houck has standing to move to intervene and to vacate orders of Court that approved the Settlement Agreement contravening Folding Carton I pursuant to Rule 60(b) of the Federal Rules of Civil Procedure on behalf of the United States and the class of late claimants?

3. Whether the Federal False Claims Act applies to the facts alleged in Plaintiff's Amended Compliant for fraud, breach of fiduciary duty, and declaratory relief as alleged by Mr. Houck?

## JURISDICTIONAL STATEMENT

This action is brought under the rules of this Court concerning jurisdiction on Writ of Mandamus, Rule 20, and other rules of jurisdiction of this Court including 28 U.S.C.§ 1651 and Rules of Civil Procedure specifically concerning the jurisdiction of an Appellate Court panel to overrule an opinion of another Appellate Court panel or to determine "the law of the case" for the purpose of winding up this

matter in a manner other than that ordered in the opinion of the Seventh Circuit at 744 F.2d 1252 (1984).

## STATEMENT OF THE CASE

This petition has arisen out of a series of actions taken by the defendant administrative committee with respect to the use of the fund commonly known as the Folding Carton Reserve Fund and the various conflicting orders by both the District Court for the Northern District of Illinois Eastern Division and the Seventh Circuit Court of Appeals. At all times since the entry of the decision and order of the Seventh Circuit panel of Chief Judge Cummings and Circuit Judges Eschbach and Flaum in the opinion written by Judge Cummings on December 5, 1984, has it been the law of the case in this matter that the remainder of the fund created pursuant to Rule 23 in MDL 250 should be deposited into the United States Treasury on September 5, 1985 pursuant to Sherman Anti-Trust Act, section 1, 15 USC section 1 and 28 USC section 2041, 2042.

On March 22, 1991, this matter came before the Seventh Circuit Court of Appeals for its ruling on the use of the remaining reserve fund. Its order requests that District Court Judge Williams (this case has proceeded through no less than four [Will, Norgle and Leighton] District Court Judges in the Northern District of Illinois) addresses certain matters concerning the fund that would, among other things, require certain monies to be retrieved and returned to the reserve fund and whether the defendant committee controlling the reserve fund can provide the present panel of Judges Wood, Cudahy, and Kanne, with actual balances and a correct accounting of the amounts remaining in the reserve fund.

This panel (Judges Wood, Cudahy, Kanne) has decided in Folding Carton II that the decision written by Chief Judge Cummings had no force or effect by their refusal to enforce the clear mandate in Folding Carton I. The panel in Folding Carton II is attempting to distribute the remain-

ing funds by application of the doctrine of cy pres rather than deposit the funds into the Treasury as the first Seventh Circuit panel ruled. Judge Wood's opinion in Folding Carton II ruled that the United States had no right to intervene even after its own member Judge Cummings requested the Justice Department do so.

Judge Williams has determined that Folding Carton I has no further application to the fund and has refused to distribute any further funds to claimants as prescribed by the panel in Folding Carton I, and has stated that the purposes for which the remaining funds shall be used even have to benefit claimants.

However, Judge Wood's opinion has affirmed Folding Carton I in that it was determined to be inappropriate for the District Court to use the reserve fund to establish any kind of foundation that included the study of anti-trust law. Consequently, he ordered that the law schools at the University of Chicago and Loyola University return all funds previously appropriated by Judge Will and the committee in open defiance of the order of Judge Cummings, Eschbach and Flaum in Folding Carton I. There can be no excuse or explainable purpose that could be given by the administrative committee and Judge Will for contumaciously defying the clear and unequivocal opinion and order of Judges Cummings, Eschbach and Flaum. The order was administrative in nature and there is no justifiable reason why these officers of the court could not carry out the simple administrative task of depositing the funds into the United States Treasury on September 5, 1985. Folding Carton II does not even hint as to why the fund is not being deposited as Congress and Judge Cummings' order clearly intended by the application of 28 USC § 2041 and § 2042.

The defendant committee, the District Court and now the Seventh Circuit seeks to apply the doctrine of cy pres according to the opinion and order of Judge Williams, and preclude any further distribution of the reserve fund to

claimants. Such orders are in open defiance of the orders of Folding Carton I.

Mr. Houck has always represented the interest of the United States by filing a claim to the fund under the Federal False Claims Act and the late claimants in his attempts to uphold the law of the case as enunciated in Folding Carton I. His Amended Complaint alleged fraud upon the district court for the administrative committee's willful actions in circumventing the order of Folding Carton I and their willful attempts to "settle around" the effect of its opinion and clear orders of administration. Folding Carton I flatly determined that the doctrine of cy pres was not an applicable use of the reserve fund. Judge Cummings determined this in his crystal clear language that states unequivocally the only administrative functions left to perform by the administrative committee and the district court consisted of paying late claimants and then depositing the remaining funds into the U.S. Treasury pursuant to 28 USC §2041 and §2042 for the use and benefit of any further late claimants. The opinion states at p. 1254:

> "As to the district court's February 17, 1983 distinguished opinion, we agree that neither the plaintiff class nor the settling defendants have any right to the reserve fund. We also agree that under these circumstances, it was appropriate for the district court to consider the cy-pres doctrine or Fluid Class Recovery to achieve an equitable disposition of the reserve fund. We discuss the "fluid recovery" concept in *Simer v. Rios,* 661 F2d 655, 675-677 (7th Cir. 1981), but refused to utilize it. As in *Simer,* the $200,000,000 paid by these defendants surely counsels deterrence, has disgorged illegally obtained profits and has satisfied the compensatory factor of the Sherman Act, so that fluid recover is not needed. Consequently it was inappropriate for the district court to utilize the reserve fund to establish a tax-exempt Foundation for research on complex antitrust litigation and on various substantive aspects of the antitrust laws, as suggested by the Administration Committee.

> The district court directed that the funding of the Foundation should not commence until February 17, 1984, one year from the date of its opinion. That period was provided to the Administration Committee for the payment of additional late claims. 557 F.Supp. at 1110. Because of our temporary stay order of February 17, 1983, and our May 3, 1983, stay pending appeal, that beneficial one-year extension was of no effect. Therefore, the Administration Committee should hold the reserve fund available for one year from the date of this opinion to cover the cost of locating absent class members and making appropriate payments to them from the principal and accrued interest of the reserve fund."

Folding Carton I determined not only that the doctrine of cy pres was not applicable, but also that the creation of any kind of foundation for use the funds would not be allowed. The panel then ordered that the funds be deposited in the treasury rather than apply cy pres. See at p. 1255:

> "In our view, establishing an unneeded Foundation for these purposes from the reserve fund would be a miscarriage of justice and an abuse of discretion. Instead, after the passage of a year hence for making appropriate payments to absent or tardy class members and for absorbing appropriate expenses, we direct that the remainder of the reserve fund escheat to the United States. The reason given by the district court for not ordering escheat to the United States government was that the federal statutory terms established in 28 USC §§ 2041 and 2042 for escheat do not apply. However, the spirit of those statutes is certainly satisfied and indeed the technical Congressional requirements present no real obstacles."

In as much as the administrative committee and Judge Will decided to file petitions for rehearing in Folding Carton I, the court again reiterated its administrative mandate to the committee and Judge Will at p. 1259 and p. 1260, which it even designated as an order. Judge Cummings' majority opinion gives everyone interested in knowing what the law

of the case is with regards to any further distribution of the reserve fund in his concisely stated decisive utterance of a clearly administrative order at p. 1259:

**ORDER**

The petition for rehearing our disposition of *In Re: Fording Carton Antitrust Litigation* is denied for the reasons set forth below.

The petition erroneously assumes that this Court substituted its equitable judgment for that of the district court. Rather, we vacated that portion of the district court's order that directed the establishment of an "Antitrust Research and Development Foundation" to be funded with the unclaimed residue of the reserve fund because such disposition of the residue was an inappropriate waste of money. We then directed that any residue from the reserve fund "escheat" to the United States pursuant to 28 USC §2042. This direction merely implements a direct Congressional mandate for the disposition of residual funds deposited with a district court.

Our statement that the disposition even satisfies the "spirit" of 28 USC §§ 2041 and 2042 was not intended to obscure our holding that those provisions clearly mandate depositing the residue with the federal Treasury. The funds in question have been paid to an Administrative Committee, whose members are officers of the district court within the meaning of 28 USC §2041. The right to withdraw this money has been adjudicated through Judge Will's approval of the settlement. It is undisputed that the only legitimate claimants to the fund are those class members whose claims have not previously been satisfied. Consequently Section 2042 applies directly to the case before us. While that Section originally spoke of money "deposited in court," by recent amendment it now reads "deposited in court under section 2041" and therefore controls. The legislative intent to make Section 2042 govern all funds covered by Section 2041,

> including those "received by the officers [of the court]," is patent.
>
> Our decision that the district court's order was an abuse of discretion need not rest solely on our belief that such antitrust research was unnecessary in the light of the tremendous past and ongoing research in that field. The district court lacked authority to commission such an academic research project and to fund it with money deposited in its registry for which no claimant could be found. While courts are encouraged to be creative in granting equitable relief, the domain of equitable remedies surely does not include philanthropic works of no conceivable or provable benefit to the parties entitled to relief.
>
> Finally, to the extent our choice of the term "escheat" implies that we were directing how the funds may be treated or utilized once they are deposited in the Treasury, the term has appeared elsewhere (including the district court's opinion) in a federal context, and our opinion did not refer to "escheat" in the same sense as reference to escheats to the states. Since our opinion does not fashion a remedy, but merely disposes of the money pursuant to § 2042, we need not decide all issues left unresolved by the statute. Questions such as whether the government obtains "title" to the money or whether a state may possess a right of escheat are beyond the scope of this controversy and their resolution would probably constitute an advisory opinion.
>
> Without subscribing to the reasoning of this order, Judge Flaum joins in the denial of the petition for rehearing."

As a result of the filing of his action in the District Court, Mr. Houck sought to uphold the law of the case as enunciated to the district court. His actions in the Appellate Court have had the effect of upholding the Appellate Court's opinion in Folding Carton I as to how Judge Will and how Judge Williams in the district court could further administrate the funds remaining after September 5, 1985. However, Judge Will later determined that the settlement

agreement entered into by various members of the classes and the administrative committee could distribute, in total contravention to Folding Carton I, several million dollars to members of the plaintiff's class who had previously been compensated and released the fund. Amazingly, Judge Will had ruled that the plaintiff class members previously compensated from the fund could be compensated no further in 557 F.Supp. 1091; a finding affirmed on appeal in Folding Carton II.

The orders of Folding Carton I and Judge Will were in total agreement that "neither plaintiff class not the settling defendants have any right to the reserve fund." The defendants by their settlement agreement as approved by Judge Will did, in fact, distribute millions from the fund to plaintiff's class members who had previously settled their claims and to the law schools at the University of Chicago and Loyola University in Chicago. There has never been an accounting of those funds since that were distributed by Judge Will and the defendant Committee. The confusion and conflict over the methods of distribution and the winding up of the reserve fund is readily apparent. The confusion and conflict over what is the law of the case in winding up this fund and others like it can only be cleared up by orders of mandamus of this Court.

Mr. Houck, in his Amended Complaint filed June 17, 1987, before Judge George N. Leighton, alleged facts which gave rise to causes of action under the Federal False Claims Act for the Committee's clear breach of fiduciary duty to uphold the orders of the Appellate Court in that they failed to place the funds in the hands of the United States Treasury as ordered in Folding Carton I. He specifically alleged that one of the attorneys for a member of the plaintiff class, Lowell E. Sachnoff, had committed a fraud upon the court and Judge Hubert Will.

## ARGUMENT

1. **The opinion and order of Folding Carton I is the law of the case and the proper administrative method of winding up this multi-district class action in accordance with Rule 23 of the Federal Rules of Civil Procedure and multi-district rules of this Court.**

At stake in this matter is the fundamental principle of law that governs our system of laws and forms the basis for our court system. Stare Decisis is the policy expressed in Latin meaning to abide by or adhere to, decided cases. When a point of law or fact becomes a controversy before a court under the doctrine of stare decisis, the court must adhere to a decision previously laid down when the facts are substantially the same. This hornbook law doctrine has been turned on its head by the panel deciding Folding Carton II. There simply is not authority or jurisdiction, nor does the opinion in Folding Carton II cite any which can allow the panel in Folding Carton II to disregard the clear mandate of Folding Carton I. The panel in Folding Carton I set forth the precedent for the administration of the remaining funds. This precedent became the law of the case for the purely administrative functions of distributing the fund to class members whose claims had not been previously satisfied and the deposit of those funds remaining on September 5, 1985 into the Treasury for the use and benefit of any other class members who would make a claim in the future.

Unquestionably, the law of the case has been a fundamental tenet of American Civil procedure for more than a century. *In re Sandlord Fork and Tool Co.*, 160 U.S. 247 at 255 (1895), states unequivocally that a District Court acting pursuant to an Appellate Court's mandate cannot vary it, intermeddle with it or examine it for any other purpose than executing its order. See also, *Ex Parte Sibbued v. United States*, 12 Pet. 488, 9 L.Ed. 1167 (1838); *Sprauge v. Ticonic National Bank*, 307 U.S. 161 (1939)

("The general proposition which moved that (district) court - that it is bound to carry the mandate of the upper court into execution and could not consider the questions which the mandate laid to rest - is indisputable" at 168); See, also, *Cascade Natural Gas Corp. v. El Paso Natural Gas Corp.*, 386 U.S. 129 (1967) which Folding Carton II cites as authority for its actions in failing to uphold the mandate of Folding Carton I.

As Mr. Houck pointed out in his complaint and briefs before the two district courts judges and the two Appellate Court panels that heard his appeal and the appeal of the United States attorney in its petition to intervene, the district court and the committee had a fiduciary duty as officers of the court to see that the law of the case in Folding Carton I was carried out. By the time that his case was filed and the United States sought to intervene, Judge Will and the committee had entered into a settlement agreement that was in open defiance to Folding Carton I. Throughout the proceedings, Judge Will and the committee have sought only to overturn Folding Carton I and impose their agreement for no other reason except they did not want to transfer the funds remaining into the Treasury as they had been ordered. Judge Will stated in open court on October 7, 1985, that the settlement agreement had to be put in place in that otherwise "the money was going to the bottomless pit of the Federal Treasury." Folding Carton II acquiesces to that unlawful agreement and tears the guts out of the rule of law as enunciated in Folding Carton I.

The appeals of the U.S. and Houck were originally heard on oral argument by the panel of Judges Flaum, and two other judges on November 8, 1988. Following oral argument, Judges Flaum and others disqualified themselves apparently in that there may be conflicts of interest and were replaced by Judges Cudahy and Kanne, who heard the second oral argument on April 12, 1989. Following petitions for rehearing and suggestion for rehearing en banc, all of the judges in the Seventh Circuit except Manion

disqualified themselves apparently for having a conflict of interest.

The opinion of Folding Carton I did not please the District Court or attorneys who stood to make large sums of money if the funds were used otherwise. Consequently, they proceed to do exactly as they pleased, and ignored the court's mandate. They entered into a so-called "settlement," which attempted to do exactly what they had been told not to do. Monies were paid to lawyers who were not to receive any under Folding Carton I, and to law schools in blatant defiance of the court. Money was paid to already-paid plaintiffs who had no right to the funds according to previous opinions of both Judge Will and Folding Carton I. Judge Flaum in the first oral argument even pointed out to counsel for the defendants there was nothing further for the court and the defendants to do except to follow the order. An agreement in open defiance of an Appellate Court order certainly causes conflict and confusion. But the reality of the order meant that the parties could not "settle around" an order of a court of superior jurisdiction. There simply was nothing further for them to agree to do except to carry out the clear order of Court. However, the order of Folding Carton I was openly and contumaciously abused by the committee and Judge Will in doing what they had been told they specifically could not do with the funds.

In *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), this Court noted that in an earlier opinion it had ordered "divestiture without delay." *Id.* at 131. Divestiture did not take place and parties who were denied intervention in the remand proceedings appealed. On appeal, the United States contended that the divestiture issues were not properly before the Court because the United States, as the antitrust plaintiff had agreed to a settlement of the litigation after the Supreme Court's first ruling. *Id.* at 131-32, 136. The Court held otherwise: "We do not question the authority of the Attorney General to settle suits after, as well as before, they reach here. *The Department of Justice, however, by stipulation or otherwise*

*has no authority to circumscribe the power of the courts to see that our mandate is carried out." Id.* at 136 (emphasis added).

The threshold issue in Folding Carton II was whether the District Court and the other participants had any right to "settle" and distribute the money as they did rather than as they were ordered. The new panel hearing oral argument apparently answered that question in the negative. However, the third panel and the present panel wrote an opinion that essentially permitted what its previous panel had said was impermissible. Folding Carton II held that Superior Court directives cannot be ignored by the use of a settlement agreement concluding that the settlement was wrong, but in an inexplicable about face, it decided that since the United States did not timely object to the purported agreement, the court was powerless to do anything except give it credence. The net effect has been to enforce the "agreement" and subvert the law of the case of Folding Carton I.

Houck submits that this analysis cannot be permitted to stand. It places expediency above a court's authority. It places the form of the agreement over the substance of the law of Folding Carton I. Either the settlement is all wrong, or it is all right. Under any interpretation of *Cascade* it is wrong. Folding Carton II did recognize that the agreement was wrong. But, purported failure of the United States to object, and the difficulties in getting money back from lawyers and plaintiffs paid millions of dollars in open defiance of an order cannot be reason of court sufficient to compromise a court's authority. If the settlement could not be entered into, all the money should have been ordered to be returned to the Treasury as previously ordered. Whether the United States failed to object to improper actions of the district court and the defendants is completely immaterial as stated in *Cascade*. Improper actions in defiance of a court order cannot become proper because there was no one there to object. Such an outcome puts the litigants in charge of the administration of orders of Supe-

rior Courts of Appeals. These defendants cannot proceed to do what they have been ordered not to do.

Nevertheless, the court in Folding Carton II chose to address the estoppel issue as if the government's inaction could cure the committee's wrongdoing. In doing so, however, that panel chose to ignore the body of regulations governing the release of claims by the United States. (See, 28 C.F.R. §0.160(a)(2) which provides settlement authority limits of $750,000.) It also used *Portman v. United States,* 674 F2d 1155 (7th Cir. 1982) as window dressing for its estoppel argument against the government.

*Portman* is a quirk whereby the post office was estopped from asserting its regulations to what may qualify as "non-negotiable documents" for insurance purposes. The traditional view is that equitable estoppel will not lie against the government to prevent the frustration of federal statutes and regulations. See *Federal Crop Insurance Corp. v. Merrill,* 332 U.S. 380 (1947); *Utah Power & Light Co. v. United States,* 243 U.S. 389 (1917) and *Scheiker v. Hansen,* 450 U.S. 785 (1981). Folding Carton II's application of the estoppel doctrine not only frustrates the government in its claim that there was no waiver of its interest in the fund as set forth in Folding Carton I or that it even had the authority to waive such interest, but it also provides another cure for the committee's flouting of the mandates of Folding Carton I.

The Solicitor General previously in his cross-petition for Writ of Certiorari, in this Court's October Term, 1989, explained to this Court the reasons for granting the cross-petition in response to the opinion of Folding Carton II and the application of the doctrine of equitable estoppel vis-a-vie enforcing the public laws. Such an application could be a violation of the basic principles of separation of powers.

After Mr. Houck's appeal was denied by Folding Carton II, he attempted to intervene on behalf of the United States and the late claimants in order to preserve their interests. The District Court Judge Ann C. Williams had been as-

signed the case. On April 17, 1990, in open court, she decided that Mr. Houck could not intervene on behalf of a late claimant or the United States. The record reflects that she also interpreted Folding Carton II to mean that the late claimants or any other potential class members had no further interest in the fund. When counsel for Mr. Houck inquired of the court as to whether in applying cy pres to the fund the applicants would show how the late claimants would somehow benefit, Judge Williams responded in the negative. At the same hearing, Judge Williams appointed the same committee that even the panel in Folding Carton II had acknowledged attempted to circumvent the mandate of Folding Carton I.

Judge Williams' memorandum opinion and order of March 5, 1991 now sets forth how the committee and the court are going to distribute the funds. They propose that after the payment of attorney fees to various lawyers and members of the committee, the remaining funds will be used as seed money to start a permanent national public interest fellowship program with the court retaining the power to approve the first board selected to oversee the program. Judge Williams' order goes on to implement the most astounding part of Folding Carton II - that part of the opinion awarding attorneys fees to the law schools of the University of Chicago and Loyola University for their applications and defending their losing cause against Mr. Houck's action to uphold Folding Carton I's mandate. There can be no doubt that setting up anti-trust foundations at the law schools was an abuse of discretion. It is absolutely incomprehensible how these two distinguished law schools could proceed to apply for any funds with the opinion of Folding Carton I staring them in the face. Then to somehow justify their efforts by awarding them attorneys fees is incredible. Their actions could never be construed as benefiting the fund by any stretch of the imagination. The plain language that even Mr. Houck, as a layman, could read and understand should have deterred them from any further application to establish any kind of

anti-trust foundation. Even the West Digest headnotes in its publication of the opinion states that such a use of funds is an abuse of discretion. Surely the law schools could see or be held to some standard of notice that accepting any monies from the fund was a violation of the law of the case as set forth in Folding Carton I. Yet, Folding Carton II does not even hold them to such a standard nor recognize that such conveyances would openly violate an order of a superior court.

Folding Carton II is clearly erroneous in its appreciation of the doctrine of cy pres in that the application of this doctrine is not an appropriate disposition of the reserve fund. This multi-district class action is subject to the requirements of Rule 23(b)(3) that before the suit may proceed, the class action device must be found superior to other available methods for the fair and efficient adjudication of the controversy. Superiority of the class action device to distribute the reserve fund to members of the injured class who are still making claims on the fund is obviously a better method of meeting this jurisdiction requirement of Rule 23 than applying the doctrine of cy pres. Folding Carton I noted that as in *Simer,* (its previous opinion on the subject) the Seventh Circuits did not apply the doctrine in that the purpose behind both fluid recovery and cy pres theories were met and therefore not needed. The application of such theories is not needed to wind up this matter nor does such an application meet the requirements of Rule 23(b)(3).

The cy pres doctrine is actually a rule of construction applied by courts to effectuate testamentary charitable gifts that would otherwise fail. A court in applying the principle would look for an alternate donee that would best serve the testator's original purpose. Its application to this fund has no basis in law or fact and is clearly erroneous. Only this Court can correct this error by its proper guidance to the courts below on how to apply the statutory mandate of 28 U.S.C. 2041 and 2042 as set forth in Folding Carton I.

Folding Carton I was correct in its application of these statutes in that 28 U.S.C. § 2042 permits an entitled claimant to recover from the United States and raises no unconstitutional taking of funds. This is clearly the best device for the fair and efficient adjudication of the controversy under Rule 23(b)(3). Cy pres is not a remedy available under Rule 23(b)(3) and should not be in that the injured class would be completely denied any further benefits of the fund established only for its benefit. This is now the case, with Mr. Houck presenting legitimate class members to the court and being denied the benefit of the fund which was created under Rule 23 for their specific use and benefit and none other. This erroneous application must be overturned before the Seventh Circuit takes any further action with respect to the funds remaining.

2. **Paul Houck has standing to move to intervene on behalf of the United States and Late Claimants to the Fund and Mr. Houck has standing to move to vacate the orders of court that approved the settlement agreement contravening Folding Carton I pursuant to Rule 60(b) of the Federal Rules of Civil Procedure on behalf of the United States and the class of Late Claimants.**

Rule 60(b)(4) clearly applies where a judgment is not void merely because it is erroneous, but only where a court renders a decision in which it lacks subject matter jurisdiction or acts in a manner inconsistent with due process of law.

The landmark due process decision in class action law is *Hansberry v. Lee,* 311 U.S. 32 (1940), in which the Supreme Court refused to give res judicata effect to a state court decision in which certain ostensible class members had not received notice and had not been adequately represented. Due process clearly has been interpreted in that case to mean that adequate representation is a prerequisite for any device used to distribute a fund created pursuant to Rule 23. By entering into the settlement agreement, thereby

denying any further distribution to class members, the class members have hardly been adequately represented.

The settlement agreement was clearly void under any interpretation of Folding Carton I or as a device that adequately represents claimants to the reserve Fund. The court under Judge Will was not following a direct order of his immediate superior court panel, and any exercise of the court's jurisdiction in approving the settlement agreement was not erroneous, but void as patently inconsistent with every notion of due process owed to the plaintiff class members making claims as set forth in Folding Carton I.

These defendants have yet to answer the allegations of Mr. Houck and the United States that they not only breached their fiduciary duties as officers of the court in their misapplication of the funds, but also all actions as such were a fraud upon the opinion and order of Folding Carton I and that as being void and that panel of the Seventh Circuit.

Mr. Houck has standing not only as a claims administrator acting on behalf of a claimant, Lakeview Dairy, Inc., but also as a concerned citizen, that the Seventh Circuit is not applying the law in a proper manner under the Constitution. Any future claimants such as Lakeview Dairy, Inc. are now in a position to lose the benefits of their claim and all other claimants will be denied their rights in the fund unless this Court acts to supervise the winding up of this matter in accordance with Folding Carton I.

Mr. Houck also has standing as a *qui tam* plaintiff and this Court should exercise its jurisdiction over these defendants pursuant to the Federal False Claims Act in that there has been harm to the treasury as a result of the actions of the defendants in their willful failure to deposit funds into the Treasury as ordered by the panel in Folding Carton I. The Treasury now stands open to claims that it is obligated to pay under Folding Carton I. However, the Treasury now does not have the fund deposited with it as

ordered by the Seventh Circuit and by the laws of Congress as expressed in 28 U.S.C. § 2041 and § 2042.

Paul Houck should be granted the right to intervene on behalf of the United States and the claimants to the fund under the general jurisdiction of a federal question under 28 U.S.C. § 1331 and 60(b) as he has continually alleged. This petition is the only way that a final decision of the district court and the Seventh Circuit could be reviewed in that the Seventh Circuit has approved Judge Williams' order.

The problems of appealability in these kinds of actions were addressed in Folding Carton I in its reliance upon *In Re General Motors Corporation Engine Interchange Litigation,* 594 F.2d 1106 (1979, 7th Cir.) (See 594 F.2d at 117.) Surely the requirements of *Ghen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949) have been met and this case falls within "that small class which finally determines claims of right separable from and collateral to, rights asserted in the action, too important to be denied review and too independent of the course itself to require that appellate consideration be deferred until the whole case is adjudicated." at 546.

This case has bounced from district court judge to district court judge and now there is a true conflict in the circuit between the panels of Folding Carton I and Folding Carton II. There never has been an express entry of Judgment under Rule 54(b) winding up this matter, nor has this matter been terminated under Rule 11 of the Rules of Procedure of the Judicial Panel on the Multi-District Litigation. Unless this Court determines the issues brought by this petition, it appears that no other party will contest the settlement agreement which will be effectuated once the time passes. The only way this Court can exercise its jurisdiction is to grant Mr. Houck the right to intervene on behalf of the United States and the late claimants such as the Lakeview Dairy, Inc.

The right to intervene through this Petition for Writ of Mandamus would satisfy the spirit and intent of Rule 24 in that Lakeview Dairy, Inc. has asserted a right to be compensated by the reserve fund and certainly belongs to the class of claimants who were injured due to anti-trust violations. The only way that Rule 24 can be upheld is to issue Writs of Mandamus under 28 U.S.C. 1651, allowing Mr. Houck, the Lakeview Dairy, Inc., the United States and the class of potential late claimants to intervene as necessary and appropriate to aid the jurisdiction of this Court to uphold principles of law that have been circumvented by the defendants agreement and the panel of Folding Carton II. The only way that the rights of the claimants can be upheld for the purpose of determining their constitutional rights of procedural due process owed to them is to issue orders as to what process is due them under the Constitution and this court's opinions under these facts.

Failure of this Court to take jurisdiction of this matter and to issue orders of guidance to the Seventh Circuit would cause the plaintiff's class and the United States to lose all their interest in the reserve fund under clear Congressional and Judicial mandates in Folding Carton I and 28 U.S.C. § 2041 and § 2042. There can be no doubt that a denial of this petition would be a denial of their right to pursue their claim in the reserve fund. As such it is property interest at stake for the late claimants within the parameters of *Paul v. Davis,* 424 U.S. 693 (1976).

The order of Folding Carton I established the exact amounts of the claims and vested petitioners like Lakeview Dairy, Inc. with "legitimate claim of entitlement" to the exact amount of their claims. As stated in *Board of Regents v. Roth,* 408 U.S. 564 at 577 (1972) their interest must be protected in order to uphold the doctrine of stare decisis:

> "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a

> hearing to provide an opportunity to vindicate those claims."

The only question that remains is what process is due. See, *Morrisey v. Brewer,* 408 U.S. 471 (1972).

In *Mathews v. Eldridge,* 424 U.E. 319, 335 (1976), this Court established the framework for determining the necessary level of procedures. It determined that a court must consider the nature and weight of the private and public interest involved, and the value of additional procedural safeguards. The public interest to see that the doctrine of stare decisis and the laws of Congress are upheld should carry great weight with this Court. The value of additional procedural safeguards for winding up this case as directed by this Court is necessary to make clear how such funds should be terminated under Rule 11 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation of this Court and how they should be distributed after 28 U.S.C. § 2041 and § 2042 have been applied.

This Court under *Davis v. Passman,* 442 U.S. 228 (1979) and *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 338 (1971) has held that a cause of action for damages arises under when Fourth Amendment rights are violated *(Bivens)* and the Due Process Clause of the Fifth Amendment is violated. All other claimants to the fund could have causes of actions for damages against the U.S. as a result of there being no funds to distribute as ordered under Folding Carton I. Unless Mr. Houck is allowed to intervene, the Treasury will be open to their claims. There is no doubt that under Folding Carton I, claimants to the fund and the United States have a clear right to the monies remaining on September 5, 1985, and the respondent judges and defendant administrative committee had an equally clear duty to pay only late claims from the reserve fund and to deposit those monies remaining in the reserve fund on September 5, 1985, into the Treasury. Their failure to do so has opened up the Treasury for fiduciary liability under 20 U.S.C. 2041 and 2042.

Mr. Houck has sought to offer the court remedies as provided by Rule 57 of the Federal Rules of Civil Procedure and to obtain a declaration of the rights of the United States and the claimants to the reserve fund in accordance with 28 U.S.C. § 2201. Rule 67 of the Rules of Civil Procedure also clearly make 28 U.S.C. § 2041 and § 2042 applicable. These rules of law must be upheld by this Court. This can only be accomplished by allowing the petitioner to intervene and for this court to issue its order as to what the law of the case is as applied to the administration of the reserve fund.

3. **The Federal False Claims Act (31 U.S.C. § 3729 *et seq.*) applies to the facts alleged in plaintiff's Amended Complaint in that the reserve fund was not deposited into the Treasury on September 5, 1985 as ordered in Folding Carton I and therefore the Treasury has been hermed by being subjected to possible claims of members of plaintiff's class who will not be compensated by funds which should have been deposited pursuant to 28 U.S.C. 2041 and 2042, the Federal False Claims Act as amended in 1986 (31 U.S.C. § 3829, *et seq.*) applies to the facts as alleged in the Amended Complaint of Mr. Houck, and § 3730(e)(4)(A) is not a jurisdictional bar to review the matters pending before the Court.**

It was error of the panel in Folding Carton II and Judge Norgle in the District Court to determine that Mr. Houck is not a proper *qui tam* plaintiff under the jurisdictional bar as set forth in § 3730(e)(4)(A) of the False Claims Act.

There is no doubt in reading the legislative history of the False Claims Act of 1986, that Congress intended to expand the role of the *qui tam* plaintiff by increasing the incentives for private individuals to bring suits on behalf of the government and also provided a certain amount of protection for such individuals. (See House Report 99-660 p. 22-24 and Senate Report No. 99-345 p. 11-13.)

The original False Claims Act did not provide any provisions with regard to who may prosecute an action. As a result, many actions appeared to be based on criminal indictments previously brought by the government. The government protested these kinds of *qui tam* actions. See, *United States ex rel Marcus v. Hess,* 317 U.S. 537 (1943). In that case, the government contended that an action brought by an informer should be barred because he brought no information of his own to the suit and such a practice would lead to a race to the courthouse, thereby infringing on the Attorney General's control over criminal and civil fraud actions. However, this Court rejected those arguments and did not require that a plaintiff base his suit on information he had provided the government or that the Attorney General had exclusive control over governmental civil fraud litigation. As a result of the decision in *Marcus v. Hess,* the Act was amended in 1943 to preclude *qui tam* suits based on information in the government's possession even though the government took no action on the information.

The Senate Committee report for the 1986 amendments also acknowledges the problems contended in *United States ex rel Marcus v. Hess, supra.* (See Senate Report 99-345, p. 10-11.) However, it probes further into the decision and quotes Justice Black writing for this Court and referring to its earlier decision, *United States v. Griswald,* 24 F.361, 366 (D. Ore. 1885), in which that Court said:

> The statute is a remedial one. It is intended to protect the Treasury against the hungry and unscrupulous hosts that encompasses it on every side and should be construed accordingly. It was passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with

> the ordinary methods as the enterprising privateer does to the slow-going public vessel.

The House Judiciary Committee report on the 1986 Amendments were concerned with instances in which the government knew of the information that formed the basis of the *qui tam* suit, but took no action. (See House Report 99-660, p. 22-23.) The original House Bill (H.R. 4827) provided that an action based solely on public information would be dismissed unless the government had the information for six months and failed to act.

The Senate Committee also reviewed the legislative history of 1943 amendments to the Act stating that the jurisdictional bar to *qui tam* suits applied if the action was based on information in the possession of the government unless the relater was the original source of that information. (Senate Report 99-345, p. 12)

However, the final version of Sec. 3730 was amended prior to passage (P.L. 99-562). The six-month provision in which the government was to act was dropped in favor of the original source exception. However, the Act still provided an award to a *qui tam* plaintiff whose information was within the realm of government knowledge by various methods of public disclosure even though he was not the original source if the government intervened and prosecutes the case successfully. See, 31 § 3730(b)(3) and (d)(2).

Congressman Berman of Kansas included the completed legislative history for the Congressional Record. (See Congressional Record October 7, 1986, p. H9388-89) There, the Congressional intent was stated with regards to public disclosure of transactions and information before various public proceedings that form the basis of an action under the False Claims Act. The intent of Congress was set forth in the Congressional Record as follows:

> "2. Who may bring such an action? . . . Before, the relevant information regarding fraud is publicly disclosed through various *Government hearings, reports and investigation which are specifically identified in*

> *the legislation* (our emphasis) or through the news media, any person may file such action as long as it is filed before the government filed an action based on the same information."

It thereafter states very concisely:

"*Once the public disclosure of information occurs through one of the methods referred to above* (our emphasis), then only a person who qualifies as an 'original source' may bring the action."

The Seventh Circuit's interpretation that every civil lawsuit proceeding throughout the country independent of any government action is a public disclosure of information as in a government hearing within the Congressional intent and thereby taking such information out of the jurisdiction of the False Claims Act is not a reasonable interpretation and flies in the face of the clearly stated Congressional intent.

Until Mr. Houck and his attorneys informed the government by meeting with U.S. Attorneys, Ms. Needles and Ms. Wawzenski prior to filing suit, the government apparently had no information with regards to the "Stipulated Settlement Agreement" or the disposition of the reserve fund. No one except those who benefited from the scheme apparently knew what was happening to the reserve fund. Mr. Houck has revealed fraud both upon the court's order in Folding Carton I and U.S. Treasury for exposing it to claims from persons/entities like the Lake View Dairy. It is difficult to understand why a court would refuse jurisdiction to even hear this matter. The information forming the basis of claim was not publicly disclosed prior to filing suit. Mr. Houck is the original source of attempts to "settle around" Folding Carton I and to circumvent its orders to deposit the reserve into the Treasury.

Indeed, the docket sheet itself reveals that there are no notices being sent to anyone with regards to how the Seventh Circuit will distribute the remainder of the reserve fund. There has been no public notice in compliance with

Rule 23 that this matter is being terminated. Without the efforts of Mr. Houck in bringing this action, at the very least, the reserve fund would not have recaptured the funds distributed illegally to the law schools. Yet, Judge Williams' order does not recognize that the Reserve Fund has benefited by the actions of Mr. Houck.

The information in Mr. Houck's complaints have never been publicly disclosed until this suit was filed. No one has ever accused the defendants of taking monies that rightfully belong in the United States Treasury after September 5, 1985, until Mr. Houck's suit was filed as an original action in the district court. The Attorney General later alleged the same facts and law in trying to intervene before Judge Will. The office of the Attorney General probably would not have discovered those facts and law but for the plaintiff and his attorneys disclosing it to them. To now turn to Mr. Houck and rule that those facts and law were previously publicly disclosed contradicts the intent of Congress and the plain meaning of the statute. One should not be allowed to escape prosecution under the False Claims Act because the underlying acts were a part of judicial proceedings in which the government should have been made a party but was systematically excluded. The acts of the defendants in conspiring to keep these funds from the Treasury as ordered by this Court fall within the purview of the False Claims Act in causing harm to the Treasury. Therefore, Mr. Houck has alleged jurisdictional facts necessary to give him standing under the Federal False Claims Act. This Court should apply it to the acts of the defendants herein and this Writ of Mandamus.

## PRAYER FOR RELIEF

Wherefore, a Writ of Mandamus should be granted in favor of the interest of the Untied States and the claimants to the Fund in order to declare the relief that Mr. Houck first asserted on August 17, 1987, as requested in his Second Amended Complaint, filed August 31, 1987, in that

Folding Carton I is the law of the case as should be applied to the Fund in order to uphold the clear duty of the defendants to deposit the remainder of the Fund into the United States Treasury, and in order to preserve the integrity of the court system and the principle of Stare Decises. Those writs should order an accounting of all monies of the Fund after September 5, 1985, in order to determine under the principles of the Common Fund Doctrine whether the monies distributed pursuant to orders of the District Court and the Appellate Court were distributed for the use and benefit of the plaintiff class members who had not been previously satisfied in their claims to the Fund.

Respectfully submitted,

JOHN D. BRENNAN
Attorney for Plaintiffs

**UNITED STATES COURT OF APPEALS**
**For the Seventh Circuit**
**Chicago, Illinois 60604**

**Sept. 9, 1991**

**Hon. Harlington Wood, Jr., Circuit Judge**
**Hon. Richard D. Cudahy, Circuit Judge**
**Hon. Michael S. Kanne, Circuit Judge**

**No. 88-1314**

**PAUL HOUCK, on behalf of the United States of America, *Plaintiff-Appellant,***
***vs.***
**FOLDING CARTON ADMINISTRATION COMMITTEE, *et al, Defendants-Appellees.***

---

No. 88-2438
In RE: FOLDING CARTON ANTITRUST LITIGATION
APPEAL OF: UNITED STATES OF AMERICA
MDL-250, Hubert L. Will, *Judge*

**O R D E R**

By Order dated May 28, 1991 this court affirmed in all respects except one, the Memorandum Opinion and Order of Judge Williams entered by the district court on April 25, 1991 responding to the prior remand from this court, *In re Folding Carton Antitrust Litigation,* 884 F.2d 484 (7th Cir. 1989). The one remaining issue concerned the attorneys' fees allowed to attorneys Forde and Mason which had been reduced by the district court by 20%. The attorneys raised the fee issue on appeal. No other party appeared. Since the arguments of the attorneys were substantial we did not decide the issue but remanded the question to Judge Williams to reconsider in light of the appellate arguments of the attorneys, and thereafter to advise this court. This court retained jurisdiction.

By Order dated August 20, 1991 Judge Williams, after carefully reviewing the record and arguments, has concluded that attorneys Forde and Mason are entitled to the full amount of the fees claimed. We will not disturb the findings of a district court in the determination of fee awards unless there is an evident abuse of discretion, *Graham v. Sauk Prairie Police Comm'n,* 915 F.2d 1085, 1108 (7th Cir. 1990), and in the present case we find none.

The finding of the district court allowing the attorneys the full amount of the fees claimed is therefore affirmed.

This case now comes to a close in this court, the district court being affirmed in all respects.

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

MDL 250

IN RE FOLDING CARTON

ANTITRUST LITIGATION

# MEMORANDUM OPINION AND ORDER

## I
## National Public Interest Fellowship Program

On August 13, 1990, the court reappointed Thomas J. Boodell, Jr., Perry Goldberg, James B. Sloan and Alexander Domanskis to serve as members of the Administration Committee ("the Committee") for the Reserve Fund created as a result of the settlement of the Folding Carton Antitrust Litigation. The court decided that the money remaining in the Reserve Fund should be used to finance a national public interest fellowship program and the court directed the Committee "to investigate the mechanics" of setting up such a program. The Committee worked diligently to comply with the court's directive, meeting with a number of people from a variety of organizations. The Committee also met with the court on a regular basis to report on the progress of their investigation, to solicit the court's input and guidance, and to discuss various options for setting up the fellowship program. As a result of these meetings, the Committee concluded that the Reserve Fund should not be used to simply fund public interest fellowships for a finite period of time, but instead the fund should be used as "seed money" to establish a permanent national fellowship program to which foundations, corporations, law firms and

individuals could contribute. As will be discussed in greater detail below, the court agrees with the Committee that the money remaining in the Reserve Fund, after the payment of attorneys' fees[1], should be used to establish a permanent national public interest fellowship program.

The court explained in its August 13 order that using the money remaining in the Reserve Fund to establish a public interest fellowship program is an appropriate use of the money because the program would be national in scope and because there is an urgent need for more legal assistance for the poor. The court noted that although there is a desire among graduating law students and outgoing judicial clerks to do public interest work, many do not end up in the public interest sector both because public interest jobs are scarce and because public interest salaries are often insufficient to cover law graduates' or clerks' extensive loan obligations. The public interest fellowship program set up by Skadden, Arps, Slate, Meagher & Flom helps bring more graduating students and judicial clerks into the public interest sector because their program makes it financially possible for public interest organizations to offer, and for law graduates and clerks to accept jobs which provide legal aid to the poor. However, as the Committee pointed out, Skadden, Arps has donated a finite sum of money to their program so "when it is over, it is over." Committee's Recommendation at 3. Therefore, the Committee recommended that the court use the Reserve Fund to set up a permanent fellowship program which will continue to operate far into the future.

The Committee submitted a detailed proposal, drafted by the National Association for Public Interest Law ("NAPIL"), outlining how the National Public Interest Fellowship Program ("NPIFP") would work.[2] The proposal suggests that in order to attract a large and diverse applicant pool, NAPIL

[1]The Court will rule on the various fee petitions submitted for work done in connection with the final phases of this litigation in the second portion of this opinion.

[2]NAPIL's proposal is submitted as an attachment to this order.

would first advertise the existence of NPIFP at law schools, legal education seminars, and public interest conferences, as well as through individual mailings to certain targeted communities. NAPIL would also establish a selection committee comprised of lawyers from private firms and from public interest organizations. This selection committee would judge applicants based on "the quality of the applicant, the proposed project, and the sponsoring organization." NAPIL Proposal at 4. Each fellowship would last for two years, although perhaps some could be extended as the program expands and more money becomes available. NPIFP would fund the Fellow's first year salary in its entirety and the sponsoring organization would pay half the Fellow's salary the second year. NPIFP would also provide loan assistance to Fellows with outstanding student loans.

NAPIL's proposal differs from the Skadden Fellowship Program in that it also includes "an aggressive strategy to promote the NPIFP and target additional funding sources" for NPIFP. *Id.* at 5. These "additional funding sources" would provide the money necessary to keep NPIFP functioning into the future. NAPIL proposes that its own law firm fund-raising project, The Public Service Challenge, be used as a framework for the campaign to raise funds for NPIFP. NAPIL states that it can "devote the energy and expertise of [its] in-house fundraiser to the promotion of the Fellowship program" and that NAPIL intends to hire a staff assistant for the project as well. *Id.* at 6. The court anticipates that NPIFP will receive funds not only from foundations, corporations, law firms and individuals, but also from other excess settlement funds created in other cases. As the funds generated through these efforts increase, a greater percentage of the interest generated by the Reserve Fund can be devoted directly to funding fellowships. Finally, NAPIL would form a governing Board, which would reflect the national scope of NPIFP, to oversee the entire project. *Id.* at 7. NAPIL states that its existing Board can provide many renowned attorneys both from the private bar and from the public interest

community. NAPIL also intends to ask representatives from the Public Interest Law Initiative, the Skadden Fellowship Program and other relevant communities to serve on the Board. Although NAPIL's proposal does not specifically so state, the court would retain the power to approve the first Board selected to insure that it does in fact reflect the national scope of the program.

On a related note, NAPIL also proposes that it use money from the Reserve Fund to address the inability of public interest organizations to retain experienced attorneys. NAPIL suggests that it would devaluate alternative models to entice attorneys with three to seven years of experience to remain in the public interest sector." *Id.* at 8. NAPIL would then use $20,000.00 from the Fund to "provide salary stipends or some other appropriate reward" to encourage experienced attorneys to continue to do public interest work. This suggestion ties in with NAPIL's focus on creating permanent solutions to the shortage of legal aid to the poor.

The court agrees with the Administration Committee and NAPIL that it would imprudent to use all the money in the Reserve Fund to directly fund fellowships, without providing any permanent infrastructure for the program to continue once the Reserve Fund is depleted. Although there is a substantial sum of money left in the Reserve Fund, it is not enough to fund fellowships indefinitely. In contrast, the proposed fellowship program, coordinated by the Committee and drafted by NAPIL, does have the potential to last indefinitely. If NAPIL is successful in its fundraising efforts, and it should be given its experience in the area, NPIFP could always provide the opportunity for graduating law students and outgoing judicial clerks to obtain public interest jobs.

In sum, having a permanent source of funding for public interest legal work has far-reaching benefits: (1) it benefits recipients of the legal services; (2) it benefits graduating law students and judicial clerks who have a desire to

practice public interest law; (3) it benefits public interest organizations, which are burdened with the responsibility of securing much, if not all of their own funding; and (4) it benefits society as a whole to achieve justice for those who might not otherwise have access to the legal system. For these reasons, the court finds that using the Reserve Fund to establish the National Public Interest Fellowship Program is appropriate under the cy pres doctrine and the court adopts the proposal of the Committee and NAPIL in its entirety.[3]

## II
## Award of Attorneys' Fees

In its most recent opinion in the Folding Carton Antitrust Litigation *("Folding Carton II")*, the Seventh Circuit made several rulings regarding the awarding of attorneys' fees on remand. First, the court stated that although the law schools of the University of Chicago and Loyola University were not entitled to the grants from the Reserve Fund which the district court awarded to them, the law schools were "entitled to reasonable attorneys' fees attributable to their involvement in the application process and subsequent related events. . ." *In re Folding Carton Antitrust Litigation*, 881 F.2d 494, 502 (7th Cir. 1989). Second, the court directed the district court to determine on remand whether any previously approved fee petitions had included fees for the original attempt to establish an antitrust foundation. If the district court found fees related to creating an antitrust foundation had been approved and distributed previously, the district court was to order the fees returned to the Reserve Fund. Third, the Court of Appeals states that no attorneys' fees were to be awarded for work done in connection with selecting the law schools which would receive grants because the Seventh Circuit considered the

[3]The court reiterates its addition to NAPIL's proposal that the court will retain the power to approve the members selected for the first governing Board.

law school grants to be a second attempt to use the Reserve Fund for antitrust research. Fourth, the court held that attorneys' fees could be awarded for "matters related to the motion of the United States to intervene, or to other matters not voided by this court." *Id.* at 503. Finally, the court held that "the Administration Committee shall be entitled to reasonable attorneys' fees from the Reserve Fund for the defense of the *[Houck qui tam]* case." *Id.* at 506.[4]

This court received fee petitions from Loyola University School of Law; the Administration Committee; Kevin M. Forde, Ltd., as counsel for the Administration Committee; Sachnoff & Weaver, Ltd., as counsel for the plaintiff class; Arnold & Porter, as counsel for the Honorable Hubert L. Will; and Zimmerman Reed and John D. Brennan, as counsel for Paul Houck.[5] The court realizes that in deciding the amount of attorneys' fees to be awarded in a common fund case, the court must act as "fiduciary for the fund's beneficiaries and must carefully monitor disbursement to the attorneys by scrutinizing the fee applications." *In Re Gould Securities Litigation,* 727 F. Supp. 1201 (N.D. Ill. 1989), *quoting, Skelton v. General Motors Corp.,* 860 F.2d 250, 253 (7th Cir. 1988). Therefore, the court has closely

[4]The Seventh Circuit stated in two places that the parties shall bear their own costs. *Id.* at 503, 506. However, none of the attorneys filing fee petitions are "parties" in the traditional sense of the word. "'Party' is a technical word having a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought, whether in law or in equity, the party plaintiff or defendant . . ." *Black's Law Dictionary* 1122 (6th ed. 1990). The attorneys who filed fee petitions may have represented parties during the litigation (i.e., Sachnoff & Weaver represented the plaintiff class) but they are now before the court on their own behalf to recoup the fees and costs they personally incurred while representing their clients or while assisting the court. Because the court finds the attorneys seeking fees are not "parties," the court awards money from the Fund for items which would be classified as "costs" under 28 U.S.C. §1920 and/or Appellate Rule of Civil Procedure 38. *See* Analysis of Individual Petitions, *infra.*

[5]Although the original fee petitions were received by the court between January and September, 1990, the court continued to receive additional documentation in support of the petitions through February 20, 1991.

inspected each petition to determine whether the amounts sought are both fair to the beneficiaries of the Reserve Fund and are allowable under the Seventh Circuit's previous rulings in this case. The court will assess each petition in turn.

### Petition of Loyola University School of Law

Loyola University School of Law seeks reimbursement for attorneys' fees it incurred in trying to protect the $1.2 million grant it had received from the district court to establish a Center for Antitrust Law in the Public Interest. Loyola's counsel, Mr. Frank J. McGarr of Phelan, Pope & John, Ltd., filed a Petition to Intervene in the appeals to the Seventh Circuit brought by the United States and plaintiff Houck, but the petition was denied. Mr. McGarr also filed a Petition for Writ of Mandamus to the Circuit Court, or in the alternative, a petition for certiorari in the U.S. Supreme Court. Finally, Loyola sought unsuccessfully to file an amicus brief in the U.S. Supreme Court. These attempts to preserve Loyola's grant can be classified as "subsequent events" related to Loyola's application for and award of a grant from the Reserve Fund. Therefore, Loyola should be reimbursed for the attorneys' fees it paid in connection with these filings. Loyola submitted copies of statements from Phelan, Pope & John, Ltd. reflecting that Loyola was charged $11,448.75 in fees and $1,537.48 in expenses, for a total of $12,986.23, in connection with this litigation. The court orders that Loyola receive $12,986.23 from the Reserve Fund to reimburse the school for the money it expended in attorneys' fees.

[6]The court notes that the Committee's fee petition was by far the most well-organized and thorough of all the fee petitions submitted. The court appreciates the Committee's efforts in this regard, because the fine quality of the petition helped the court, as a latecomer to this litigation, understand and evaluate all the petitions submitted.

## Petition of the Administration Committee[6]

The Administration Committee's fee petition is divided into three main sections. The first section gives an overview of the rather complex procedural history of this case, with special emphasis on the Committee's involvement in the various phases of the case, so the court could have a sense of the Committee's responsibilities throughout the litigation before it examined any specific fee petitions. The second part of the petition, in accordance with the Seventh Circuit's instructions, reexamines previously approved fee petitions in order to identify any fees paid for work done in connection with the first attempt to establish an antitrust foundation. These disallowed fees are then subtracted from the third part of the petition, which is an accounting of the work done by the Committee between December 16, 1986 and April 30, 1990.[7] The court notes that in its most recent fee petition, the Committee dutifully excluded any time spent on the second attempt to use the Reserve Fund for antitrust research.[8] The Committee also submitted a supplemental fee petition in December, 1990, and the court will discuss the supplemental petition after it analyzes the Committee's main petition.

In the second portion of its main petition, the Committee undertook the task of calculating how much time was devoted to the attempt to establish a foundation for antitrust research in each of their four previously approved fee petitions. As noted above, the Seventh Circuit held that

[7]Committee member Perry Goldberg's petition covers the period from July 1, 1986 to April 30, 1990 because Mr. Goldberg never submitted a petition for fees for his work between July 1, 1986 and December 15, 1986.

[8]The Committee did not include any time spent on reviewing the proposals submitted by the law schools and selecting which law schools would receive grants, even though the value of that time was $25,000.00. Also, as will be discussed below, the Committee calculated that 5% of the time spent opposing the government's motions was devoted to defending the grants to the law schools, and therefore the Committee subtracted 5% of the total amount requested in connection with the government motions.

any fees previously paid in connection with establishing an antitrust foundation had to be returned to the Reserve Fund. The Committee explained in great detail how it calculated the amount it had been paid from the previous petitions for work done on the antitrust foundation. The Committee first examined each petition for time which was "directly related" to the establishment of an antitrust foundation and calculated the value of this time. The Committee then examined the briefs it submitted during the timeframe of each petition. The Committee determined what percentage of the time spent preparing the briefs, if any, was devoted to arguing in favor of an antitrust foundation and calculated the value of this time. The Committee also estimated that one-third of the time spent negotiating the post-*Folding Carton I* "settlement" was devoted to the second attempt to use the Reserve Fund for antitrust research and therefore the Committee added in the value of this time as well.

Based on the aforementioned calculations, the Committee concluded that the following amounts should be deducted from the four previously approved fee petitions:

| | | | |
|---|---|---|---|
| 1. | Petition approved | March 3, 1983 | $ 1,641.55 |
| 2. | Petition approved | October 8, 1985 | 6,864.61 |
| 3. | Petition approved | October 24, 1986 | 1,619.25 |
| 4. | Petition approved | December 19, 1986 | 10,799.20 |
| | | | $20,924.61 |

The court approves of the methodology the Committee used for determining how much of the previously paid fees were earned in connection with the attempts to use the Reserve Fund for antitrust research and agrees that $20,924.61 should be deducted from the amount claimed in the Committee's current fee petition.

The Committee's current petition seeks fees for work done between December 16, 1986 and April 30, 1990. As a preliminary matter, the court notes that although this petition is for work done over the course of several years,

the Committee has not made clear whether it seeks to be compensated for the time value of this money and if so, how it wants the court to calculate that sum. There are two methods of compensating attorneys for the time value of money. The court can award attorneys' historic hourly rates, multiplied by the prime rate for the relevant year or years. On the other hand, a court can simply multiply the total number of hours expended in all the years by the attorneys' current hourly rates as a means of adjusting for inflation and the time value of money. *See Shakman v. Democratic Organization of Cook County*, 634 F. Supp. 894, 902-03 (N.D. Ill. 1986). It is not clear from the Committee's fee petition which method, if either, the Committee requests the court to use. Mr. Goldberg and Mr. Sloan calculated their fees using historic rates. Mr. Domanskis states that he is using his current rate, although that rate is lower than the other Committee members' historic rates. Mr. Boodell uses the same rate throughout his petition but does not state whether the rate is historic, current or an average of different rates from different years. The court assumes, because the Committee does not state otherwise, that the Committee is not seeking reimbursement for the time-value of money. If the Committee desires to recalculate its petition using one of the aforementioned methods, the court would consider increasing the attorneys' fee award to the Committee on a motion for reconsideration.

The current petition seeks fees for the Committee's efforts in four categories: performing administrative tasks, defending itself in the *Houck* litigation, preparing certiorari petitions and responding to the various motions brought by the United States. The administrative tasks included overseeing the "final distribution to the plaintiff class..., dealing with various leftover claim matters or inquiries, dealing with fee requests from various claimant attorneys, preparing summaries for and appearing in court to report on the status of the fund, and court appearances and review of filings since the decision of the Court of Appeals in Folding Carton II." Committee's Petition at 18-19. The Committee

requests $35,457.63 in fees and $1,248.52 in expenses for performing these administrative duties. The court approves this part of the petition and awards the Committee a total of $36,706.15 for its administrative work.

The Committee requests $89,162.85 in fees and $4,172.34 in expenses for the work it performed in connection with the *qui tam* action brought by Paul Houck. Houck is a professional claims finder who represented certain claimants in this litigation. Through his *qui tam* action, Houck sought to preserve the Seventh Circuit's determination in *Folding Carton I* that the balance of the Reserve Fund should escheat to the United States and be held by the government for late claimants. Houck sued the Committee, its members individually, their law firms and all others who were involved in the post-*Folding Carton I* settlement agreement alleging that the persons who negotiated the settlement agreement conspired to defraud the United States of the balance of the Reserve Fund. Houck pursued this action, even after the government declined to prosecute the case, and sought treble damages from the defendants. The case was dismissed for lack of subject matter jurisdiction in the district court and the dismissal was upheld on appeal.

The court realizes that the Committee members had to vigorously defend themselves against this rather unusual lawsuit which involved an enormous amount of money. Moreover, the court is aware that it was unfair that the Committee got dragged into the *Houck* litigation when it was not a party to the Folding Carton Litigation and was only involved in the Folding Carton Litigation because it was appointed by the district court to assist in the administration of that suit. However, despite these equitable considerations which weigh in favor of the Committee being compensated for all the time they spent defending themselves against Houck, the court must reduce the amount of fees claimed by twenty per cent. This is because the district court appointed able counsel, Kevin Forde, Ltd., to represent the Committee. Moreover, the *Houck* action involved

no discovery and only involved the presentation of a motion to dismiss in the district court and the court of appeals. The court finds there must have been some duplication of efforts between Mr. Forde and the Committee for the two groups to have expended time valued at over $225,000.00. Therefore, the court reduces the fees requested by the Committee for its work in the *Houck* case by twenty per cent and awards the Committee $71,330.28 in fees and $4,172.34 in expenses.[9]

The Committee requests $297,129.48 in fees and $11,353.71 in expenses for its work opposing the U.S. government's motions to intervene and to vacate the settlement. On July 10, 1987 the United States filed motions to intervene in the Folding Carton Litigation and to vacate the settlement agreement. Although during the time the settlement was being negotiated the United States represented that it had no objection to the proposed settlement, two years later the United States sought leave to intervene to have the settlement vacated on the ground that it was contrary to the Seventh Circuit's escheat ruling in *Folding Carton I.* Judge Will directed the Committee to respond to the motions to intervene and to vacate the settlement. Judge Will denied the motion to intervene and the United States appealed. The Committee was directed to respond to the appeal of Judge Will's decision. This appeal was complicated by the fact that the United States also filed an original writ of mandamus in the Court of Appeals against Judge Will and filed a motion to intervene directly in the previous appeals which had resulted in the escheat ruling. Finally, there were two oral arguments because after the first argument two appellate judges had to recuse themsel-

[9]The award of fees for the *Houck* action breaks down as follows among the individual Committee members:

| Committee Member | Amount Claimed | Amount Awarded |
|---|---|---|
| Mr. Domanskis | $ 3,570.00 | $ 2,856.00 |
| Mr. Specks | 21,713.75 | 17,371.00 |
| Mr. Boodell | 61,483.85 | 49,187.08 |
| Mr. Sloan | 2,395.25 | 1,916.20 |

ves. Ultimately the Seventh Circuit affirmed Judge Will's denial of the governments' motions. *See Folding Carton II*, 881 F.2d at 501.

The Committee originally claimed a total $312,767.87 in fees for its work in defending the settlement against the government's motions in the district court and on appeal. However, the Committee calculated that 5% of the time it took to respond to the government's motions was devoted to defending the law school research projects. Therefore, in accordance with the Seventh Circuit's mandate, the Committee subtracted the value of 5% of the time spent responding to the government's motions from its petition, which amounted to $15,638.39. The court finds that the amount claimed by the Committee to respond to the government's motions, less the amount of time devoted to defending the law school grants, is reasonable. The court awards the Committee $297,129.48 in fees and $11,353.71 in expenses for its work in connection with the government's motions.

The Committee seeks $17,363.75 in fees and $11,859.00 in expenses in connection with its work on certiorari petitions to the U.S. Supreme Court. The Committee worked with the law firm of Arnold & Porter reviewing the mandamus petition Arnold & Porter filed on behalf of Judge Will. The mandamus petition sought to reverse the portion *Folding Carton II* that disallowed giving money from the Reserve Fund to the law schools for research in antitrust and complex litigation. The Committee also filed its own petition for certiorari after the Seventh Circuit issued *Folding Carton II* seeking to reverse that portion of the Seventh Circuit's opinion which denied the Committee attorneys' fees for work done in connection with the grants to the law schools.

First, the court denies all the fees claimed by the Committee for its work reviewing the petition drafted by Arnold & Porter on behalf of Judge Will. Although the Committee states that Judge Will requested the Committee to review his certiorari petition, the Committee was aware that the

Seventh Circuit had issued an order denying Judge Will's petition for leave to retain counsel to represent him in the U.S. Supreme Court and to be compensated from the Folding Carton Settlement Fund. Therefore, the Administration Committee acted at its own risk when it committed any time to Judge Will's petition, knowing that a district court would have to ignore the Seventh Circuit's ruling in order to award fees from the Reserve Fund for work on the mandamus petition. Pursuant to the Seventh Circuit's ruling, the court denies the Committee's petition for fees for reviewing Judge Will's mandamus petition, which amounts to $2,847.75.[10]

Second, the court awards the Committee eighty per cent of the fees it requested for work performed on its own certiorari petition. As noted above, the Committee filed a certiorari petition to attempt to recoup the fees it generated in connection with administering the law school grants, which the Seventh Circuit held could not be reimbursed. *See Folding Carton II,* 881 F.2d at 503. The Committee argued that "like Masters or Receivers, the Committee members acted only at the direction of the district court, were not parties to the litigation or signatories to the Settlement Agreement and for their services they should be entitled to fair and reasonable compensation." Committee's Petition at 24. The court finds that the Committee, like the law schools, was "caught in the middle of a philosophical disagreement between the district court and the court of appeals as to which is the best charity to receive these funds." *Id.* The Seventh Circuit held that the law schools could be reimbursed for events "related to" their involvement in the application process and therefore the

[10]According to supplemental documentation submitted on February 13, 1991, Committee member Thomas Boodell, Jr. and attorney Fred Posont of the law firm of Keck, Mahin & Cate were the only attorneys who worked on Judge Will's certiorari petition. Therefore, the court will subtract $2,847.75 from the $17,066.25 claimed by keck for its work on the certiorari petitions, to leave a claim of $14,218.50 for Keck's work on the Committee's certiorari petition.

court reimbursed Loyola Law School for the certiorari petition they filed to try to reverse the Seventh Circuit's denial of their grant. Similarly, the court finds that the Committee should be reimbursed for trying to recoup the money the Seventh Circuit denied them for the costs they incurred administering the law school grants.

However, the court reduces the amount of fees the Committee requests by twenty per cent because again, the Committee was assisted by its appointed attorneys of the firm of Kevin Forde, Ltd. Therefore, the court awards the Committee $11,612.80 in fees and $11,859.00 in costs for its work on the certiorari petitions.

Finally, Committee members Mr. Boodell and Mr. Domanskis filed a supplemental petition in December, 1990 seeking fees for the time spent investigating the mechanics of establishing a national public interest fellowship program. Mr. Boodell seeks a total of $43,009.86 in fees and expenses and Mr. Domanskis requests $3,623.45 in fees and expenses. The court finds the supplemental petition to be reasonable and awards both Mr. Boodell and Mr. Domanskis all the money they request in their supplemental petition.

The following chart summarizes the court's calculations of the amount to be awarded to each Committee member based on the aforementioned findings:

| | **Fee** | **Expenses** | **Total** |
|---|---|---|---|
| Administrative Matters | $ 35,457.63 | $ 1,248.52 | $ 36,706.15 |
| The Houck Case | 71,330.28 | 4,172.34 | 75,502.62 |
| The Motions of the United States | 297,129.48 | 11,353.71 | 308,483.19 |
| The Certiorari Petitions | 11,612.80 | 11,859.00 | 23,471.80 |
| Total | $415,530.19 | $28,633.57 | $444,163.76 |

The total amount for each member of the Committee, including the amounts claimed in the petition submitted in December, 1990, is as follows:

| | Fee | Expenses | Total |
|---|---|---|---|
| Keck, Mahin & Cate (Boodell) | $372,834.86 | $28,586.87 | $401,421.73 |
| Specks & Boldberg | 51,697.00 | 1,709.16 | 53,406.16 |
| James B. Sloan & Assoc. | 22,509.45 | 217.40 | 22,726.85 |
| Ross & Hardies (Domanskis) | 12,542.88 | 699.45 | 13,242.33 |
| Total | $459,584.19 | $31,212.88 | $490,797.07 |

Each of the above requests should be reduced by the total amount of deductions from the previously paid fee petitions.

| | Total Payment | Less Prior Deductions | Total Request |
|---|---|---|---|
| Keck, Mahin & Cate | $401,421.73 | $10,454.48 | $390,967.25 |
| Specks & Goldberg | 53,406.16 | 1,901.00 | 51,505.15 |
| James B. Sloan & Assoc. | 22,726.85 | 7,577.86 | 15,148.99 |
| Ross & Hardies | 13,242.33 | 991.27 | 12,251.06 |

## Petition of Kevin Forde, Ltd.

As the court mentioned previously, Kevin Forde, Ltd. was appointed by Judge Will to represent the Committee in the *qui tam* action brought by Paul Houck. Mr. Forde and his co-counsel, Ms. Mary Anne Mason, submitted a petition for $137,565.00 in fees and $5,213.12 in expenses for the work involved in representing the Committee in *Houck*. Forde and Mason explain that their representation of the Committee was complicated by a number of factors. First, they not only had to defend the Committee members, but they also had to coordinate their defense with the other defendants named in the case. Second, because Forde and Mason

became involved in the *Houck* litigation after the *Folding Carton Antitrust Litigation* had been pending for over a decade, they had to do a great deal of background work to bring themselves up to speed on the case. Third, because the Administration Committee members wanted to be quite involved in their own defense, Forde and Mason had to spend extra time to consult with the Committee members on the various aspects of the case. Finally, Forde and Mason state that the legal issues involved in *Houck* were novel and unique and therefore extra effort was required to devise persuasive legal arguments for their clients.

The court does not dispute that there were difficulties involved in representing the Committee in the *Houck* action. However, as noted above, the case never went beyond the stage of a motion to dismiss. Moreover, the Committee members, who are themselves highly respected attorneys, devoted a substantial amount of time to helping Mr. Forde and Ms. Mason prepare their defense. Forde and Mason state that "there has been little, if any, unnecessary duplication of effort by counsel in representing the Committee." Forde Petition at 6. However, the court finds that there has to have been duplication of efforts for the Committee and Forde and Mason to have generated fees of over $225,000.00 for briefing and arguing a motion to dismiss at the district court and appellate levels. Therefore, the court reduces Forde and Mason's fees by 20% and awards them $110,052.00 in fees and $5,213.12 in expenses for their work on the *Houck* case.

Forde and Mason also submitted a supplemental petition for fees generated helping the Committee draft their certiorari petition and working on the case after it was remanded to this court. Because the court again finds there must have been some duplication of effort with both the Committee and Forde and Mason working on the Committee's certiorari petition, the court reduces the amount claimed by Forde and Mason for their work on the Committee's petition by 20%. The court awards Mr. Forde and Ms. Mason $4,155.00 in fees ($5,193.75 minus 20%) and

$63.49 in expenses for its work on the Committee's certiorari petition. The court awards Forde and Mason the total amount claimed for the work done on the case on remand, which amounts to $2,268.75 in fees and $859.72 in expenses.

### Petition of Arnold & Porter

Judge Will selected the law firm of Arnold & Porter to represent him in the U.S. Supreme Court. Judge Will petitioned the U.S. Supreme Court for a writ of mandamus or prohibition to the Honorable Harlington Wood, Jr., Richard D. Cudahy and Michael S. Kanne, or in the alternative, for a writ of certiorari to the U.S. Court of Appeals for the Seventh Circuit. The filings were made to try to reinstate the settlement agreement which the Seventh Circuit had vacated, in part, in *Folding Carton II*. Although Arnold & Porter's representation of Judge Will was intended to help those who Judge Will believed should be the beneficiaries of the Reserve Fund, and not to help Judge Will personally, the court finds Arnold & Porter cannot be reimbursed from the Reserve Fund for the majority of time it expended on Judge Will's behalf. This is because, as noted above, the Seventh Circuit denied Judge Will's petition to have his counsel reimbursed from the Folding Carton Settlement Fund before Arnold & Porter began the bulk of its work for Judge Will. The court will reimburse Arnold & Porter for the time it expended before the Seventh Circuit issued its order, which the court calculates to be $5,678.00. The court denies the balance of the petition for fees and costs.

The court notes that even if the Seventh Circuit had not issued its order denying Judge Will's counsel fees from the Reserve Fund, the court would not have granted Arnold & Porter all the fees it requested. This is because the documentation the firm submitted in support of its petition is quite inadequate. The firm submitted a photocopy of a computer printout of the time expended by various attor-

neys on this litigation, however the copy of the printout is very difficult to read in general and in some places it is illegible. Furthermore, many of the entries which purport to explain the "service rendered" are far too general. For example, some entries simply read "draft" or "legal research," without specifying what document was being drafted or what issue was being researched. Because the court must act as a fiduciary of the Fund, the court would have reduced Arnold & Porter's fee petition substantially because of these deficiencies.

**Petition of Sachnoff & Weaver**

The law firm of Sachnoff & Weaver, Ltd., which represented the plaintiff class in this litigation, submitted a fee petition for work done between May 18, 1987 and May 14, 1990. The petition requests that all the hours expended between 1987 and 1990 be compensated at the firm's current hourly rates. As stated above, the court finds this is an acceptable method of reimbursing attorneys for the time value of money and therefore the court will award fees based on Sachnoff & Weaver's current hourly rates. The petition claims fees for work done in three areas: (1) defending Mr. Lowell Sachnoff and his firm in the *Houck* action, (2) responding to the government's motions, and (3) filing a certiorari petition to the U.S. Supreme Court on behalf of the plaintiff class and responding to the government's cross-petition for certiorari. The court will review Sachnoff & Weaver's work in each of these areas.

Paul Houck named Mr. Lowell Sachnoff personally as well as the firm of Sachnoff & Weaver in his *qui tam* action. Attorneys from Sachnoff & Weaver became involved in the *Houck* litigation both to protect themselves personally and to protect the settlement which they negotiated on behalf of the class. The Sachnoff attorneys conducted some independent research regarding the sufficiency of the *Houck* complaint. They also conferred with the other defendants

to formulate a coordinated response to the *Houck* action. Finally, Mr. Sachnoff presented oral argument on behalf of the class before the Seventh Circuit when Mr. Houck appealed the dismissal of his complaint.[11] The Sachnoff firm requests $10,213.75 in fees for defending itself, as well as the settlement, in the *Houck* action.

The court will not award the full amount requested because the court finds there was some duplication of effort between the Sachnoff attorneys and the other attorneys involved in the *Houck* litigation. The court reviewed Sachnoff & Weaver's time sheets which were submitted in support of its petition and found that approximately $4200 worth of fees were generated doing research, drafting, and work for the oral arguments and that the remaining $6013.75 worth of fees were incurred conferring with the other attorneys involved in the case or reviewing pleadings drafted by other attorneys.[12] The court finds that this large amount of time spent conferring and reviewing other attorneys' work constitutes a duplication of efforts to some extent and therefore the court will reduce the amount claimed for these activities by 20%. Therefore, the court awards Sachnoff & Weaver a total of $9,011.00 (4200 + $4811 (80% of $6013.75)) in fees for its work on the *Houck* case.

Sachnoff & Weaver next petitions for the fees incurred in responding to the motions to intervene and to vacate the settlement filed by the United States. The Sachnoff attorneys met with the members of and the attorneys for the Administration Committee to represent the class's interests in responding to the government's motions. Mr. Sach-

[11] As noted above, there were two oral arguments on the issues addressed in *Folding Carton II* because after the first oral argument two members of the panel had to recuse themselves.

[12] The court estimates that Mr. Sachnoff spent 13.25 hours on conferences and review of documents and 8.25 hours on work such as preparing for and participating in the oral arguments. The court estimates Mr. seeder spent 7.75 hours on conferences and document review and 7.75 hours on work such as research and drafting.

noff also assisted in preparing and reviewing an affidavit submitted in opposition to the government's motions. And, as noted above, Mr. Sachnoff presented oral argument on behalf of the class when the United States appealed the denial of its motions to intervene and to vacate the settlement (the appeals of the United States and Mr. Houck were heard together).

After reviewing the time sheets, the court again finds that there was a substantial amount of time spent on conferences and reviewing documents in connection with the motions of the United States. The court finds that approximately $9,911.25 in fees is attributable to conferences and review of other's briefs.[13] Because the court again finds such time involves some duplication of efforts, the court will reduce this amount by 20%. This brings Sachnoff & Weaver's fee request for work done on the government's motions down to $30,629.00 ($22,700.00 + $7929.00 (80% of $9911.25)).

In a supplemental document Mr. Lowell Sachnoff stated that his firm's work in opposing the government's motions had the indirect effect of defending the law school grants. Therefore, in order to comply with the Seventh Circuit's mandate in *Folding Carton II* that no attorneys' fees be awarded for work on the law school grants, Mr. Sachnoff suggested that his firm's request for fees for work on the government motions be reduced by 5%. *See* Letter from Lowell E. Sachnoff, February 20, 1991 at 3.[14] The court agrees that the fees the Sachnoff firm incurred in responding to the government's motions should be reduced by another 5%. Therefore, the court awards Sachnoff $29,097.55 in fees for its work responding to the government's motions.

---

[13]The court estimates that Mr. Sachnoff spent 15.75 hours on conferences and review of documents and that Mr. Seeder spent approximately 21.25 hours on conferences and review of documents.

[14]This is the per cent by which the Administration Committee suggested that their fees for work on the government's motion be reduced.

Sachnoff & Weaver next requests reimbursement for the fees it incurred in filing a petition for certiorari to the U.S. Supreme Court on behalf of the class. The class's certiorari petition defended the post-*Folding Carton I* settlement and argued that the Seventh Circuit's decision to vacate the settlement, especially when no party with standing was objecting to the settlement, could serve as a disincentive to future settlements. Mr. Sachnoff also requests reimbursement for the time he spent (approximately 1.25 hours) responding to the government's cross-petition for certiorari, which sought to have the post-*Folding Carton I* settlement vacated. The court finds it cannot reimburse the Sachnoff firm for the fees and expenses it incurred filing a certiorari petition on behalf of the class, but the court will reimburse the Sachnoff firm for its work opposing the government's certiorari petition.

The court finds that the certiorari petition filed on behalf of the class primarily sought to reinstate the law school grants. The Sachnoff attorneys described their petition as "supporting" the post-*Folding Carton I* settlement, however the only portion of the settlement that was vacated by the Seventh Circuit was the law school grants. The Seventh Circuit did not disturb the additional distribution to the plaintiff class. Therefore, the only portion of the settlement to "support" in the Supreme Court was the law school grants, which the Seventh Circuit ruled had to be returned. As the court has noted several times, the *Folding Carton II* decision forbids reimbursement for time spent on the second attempt to use the Reserve Fund for antitrust research. The court calculates that the Sachnoff firm expended $11,041.25 in fees for work on the class's certiorari petition and the court denies reimbursement for those fees.

The court grants the remaining $425.00 requested which was incurred responding to the government's cross-petition for certiorari. The government's petition sought to vacate the settlement, which included the additional distribution to the plaintiff class. Therefore, the Sachnoff attorneys had to respond to protect the class's interest in their additional

payment and they should be reimbursed for their work in that regard.

Next, the court reduces the total amount of Sachnoff & Weaver's fee award by $315.00. This is because the firm inadvertently included an extra $315.00 in fees in a supplemental petition submitted in response to the court's request. Sachnoff & Weaver's original fee petition contained a summary chart which listed the attorney or paralegal's name, the number of hours worked on the case, and the hourly rate of the attorney or paralegal. In order to facilitate the court's review of their petition, the court requested the Sachnoff firm to submit an additional summary chart to show the amount of fees generated according to subject matter, i.e., the amount of fees generated in defending the *Houck* case, the amount of fees incurred working on the certiorari petitions, etc. In recalculating the fees according to the subject matter, the Sachnoff firm inadvertently added in an extra $315.00 worth of fees. For simplicity sake, the court will subtract this amount from the total amount of fees awarded, $38,533.55, to leave a total fee award of $38,218.55.

Finally, Sachnoff & Weaver requests reimbursement for $6,470.18 in expenses. Because the court is not reimbursing the Sachnoff attorneys for the cost of the certiorari petition filed on behalf of the class, the court must reduce the award of expenses by $3,455.00 ($200 filing fee for cert. petition and $3,255 fee for printing cert. petition). Therefore, the court awards Sachnoff & Weaver $3,015.18 in expenses.

**Petition of Zimmerman Reed and John Brennan**

The law firm of Zimmerman Reed and attorney John Brennan represented Paul Houck in his *qui tam* action against the Administration Committee and the parties to the settlement agreement. Zimmerman Reed and John Brennan filed a petition to collect fees from the Reserve Fund for the work they did on the *Houck* action. For the

following reasons, the court denies both petitions in their entirety.

The issue in determining whether fees can be awarded from a common fund is not whether the attorney seeking funds advocated a colorable claim, but instead whether the attorney's work helped create the fund from which others will benefit. *See Boeing Co. v. Van Gramert,* 444 U.S. 472, 478 (1980) ("a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole"). Mr. Houck's attorneys claim that they are responsible for the "recapture" of the Reserve Fund and therefore they should be reimbursed from the Fund for their fees. The court finds that this is a gross misrepresentation of the purpose and the result of Mr. Houck's attorneys' efforts. Mr. Houck's *qui tam* action sought to have the Reserve Fund money escheat back to the United States to be held indefinitely for late claimants. Mr. Houck sought this result because, as a professional claims finder, Mr. Houck could potentially earn fees by finding and assisting late claimants of the Reserve Fund. Mr. Houck clearly did not bring his *qui tam* action in order to keep the money available for the use which the court now proposes. If Mr. Houck had prevailed, then the money currently in the Reserve Fund would not be available for any cy pres purpose. Mr. Houck's lawsuit did not help those who will benefit from the proposed cy pres use of the Fund. In fact, it harmed them because tens of thousands of dollars will be taken from the Fund to repay those attorneys who had to defend themselves against the *Houck* action. For these reasons, the court denies the fee petitions submitted by Zimmerman Reed and John Brennan in their entirety.

ANN CLAIRE WILLIAMS
United States District Judge

Dated: March 5, 1991